NKS Tharmaseelan a/l NK Sinnadorai v Amaratham a/p Ramiah & Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO NA-22NCVC-40–06 OF 2018
AZMAN ABDULLAH J
25 AUGUST 2023

Land Law — Ownership — Proprietary ownership — Constructive trust — Dispute over proprietary ownership of property — Plaintiff entered private caveat on property — Plaintiff claimed proprietary ownership of property — First defendant counterclaimed for removal of caveat and declaration that first defendant was legal owner of property — Whether plaintiff retained proprietary and beneficial interest in property — Whether first defendant only held property in constructive trust for plaintiff

The plaintiff was a medical practitioner at a clinic located in Port Dickson, whilst the first defendant was an employee of the plaintiff at the said clinic. The second defendant was the developer, and the vendor of a house located in Pekan Port Dickson ('the said property'). The third, fourth and fifth defendants as the registered proprietors of the said property had given the second defendant absolute right to develop and sell the property. The main dispute between the plaintiff and the first defendant was on the proprietary ownership of the said property. The plaintiff alleged that the said property was held on constructive trust by the first defendant for the plaintiff because the plaintiff was the one who had made the relevant payments vide cheques for the purchase of the said property. The plaintiff further argued that the first defendant attempted to unjustly enrich herself by attempting to sell the property. On the contrary, the first defendant argued that the cheques were issued utilising her salaries and savings which were kept by the plaintiff in his personal bank account. In the present action, the plaintiff sought for, inter alia, the following orders: (a) a declaration that the plaintiff had proprietary interest in the said property; (b) an injunction to prevent the first defendant as well as the other defendants from removing the private caveat that was entered by the plaintiff on the said property; and (c) an order of specific performance against the first defendant to transfer the said property to the plaintiff once the full purchase price was paid. In response, the first defendant counterclaimed for the removal of caveat and a declaration that she was the legal owner of the said property. The main issue that arose was whether the plaintiff retained a proprietary and beneficial interest in the said property in which the first defendant only held the said property in constructive trust for the plaintiff.

Held, dismissing the plaintiff's claims against the defendants with costs of

RM58,000 to the first defendant and RM20,000 to the second to fifth defendants to be paid by the plaintiff:

(1) In light of the nature of the relationship between the plaintiff and the first defendant, the issue for consideration was whether the first defendant's conduct was sufficiently unconscionable for a constructive trust to be imposed. The court answered this issue in the negative. In the context of the present case, the court found that the first defendant had not gain any unjust enrichment over the said property. She was the one who intended to buy the said property, signed the sale and purchase agreement, paid bills etc. It was from the beginning that the said property clearly belonged to the first defendant. The court found that the plaintiff failed to prove that the application of constructive trust had arisen. There was no dishonest, unconscionable or fraudulent conduct committed by the first defendant in the acquisition of the said property. There was no evidence by the plaintiff which showed that the said property was acquired by the first defendant on his behalf. Neither that the plaintiff was able to show to the court that the first defendant took a loan from the plaintiff to acquire the said property. As such, there was no basis for the court to impose constructive trust in favour of the plaintiff (see paras 53 & 58–59).

(2) The court agreed with the first defendant on her counterclaim for the removal of caveat be allowed with damages and a declaratory relief that the first defendant being the legal owner of the said property. As such, the court opined that the first defendant was entitled to nominal damages of RM10,000, taken into consideration of the hardship that she went through when she was restricted to deal with the said property upon the entry of the caveat by the plaintiff. Since the plaintiff failed in his claims against the first defendant, his action against the other defendants also failed (see para 60).

[Bahasa Malaysia summary

Plaintif merupakan seorang pengamal perubatan di sebuah klinik yang terletak di Port Dickson, manakala defendan pertama adalah pekerja plaintif di klinik tersebut. Defendan kedua ialah pemaju, dan penjual sebuah rumah yang terletak di Pekan Port Dickson ('hartanah tersebut'). Defendan ketiga, keempat dan kelima sebagai pemilik berdaftar hartanah tersebut telah memberikan defendan kedua hak mutlak untuk membangunkan dan menjual hartanah tersebut. Pertikaian utama antara plaintif dan defendan pertama adalah mengenai pemilikan proprietari hartanah tersebut. Plaintif mendakwa bahawa hartanah tersebut dipegang atas amanah konstruktif oleh defendan pertama untuk plaintif kerana plaintif adalah orang yang telah membuat pembayaran yang berkaitan melalui cek untuk pembelian hartanah tersebut. Plaintif seterusnya berhujah bahawa defendan pertama cuba memperkayakan dirinya secara tidak adil dengan mencuba untuk menjual hartanah tersebut.

Sebaliknya, defendan pertama berhujah bahawa cek tersebut dikeluarkan dengan menggunakan gaji dan simpanannya yang disimpan oleh plaintif dalam akaun bank peribadinya. Dalam tindakan ini, plaintif memohon, antara lain, perintah-perintah berikut: (a) satu pengisytiharan bahawa plaintif mempunyai kepentingan proprietari dalam hartanah tersebut; (b) suatu injunksi untuk menghalang defendan pertama dan juga defendan-defendan yang lain daripada membatalkan kaveat persendirian yang telah dimasukkan oleh plaintif terhadap hartanah tersebut; dan (c) suatu perintah pelaksanaan spesifik terhadap defendan pertama agar hartanah tersebut dipindahmilik kepada plaintif selepas bayaran penuh diselesaikan. Sebagai tindak balas, defendan pertama menuntut balas untuk pembatalan kaveat tersebut dan pengisytiharan bahawa dia adalah pemilik sah hartanah tersebut. Isu utama yang timbul ialah sama ada plaintif mempunyai kepentingan proprietari dan benefisial ke atas hartanah tersebut di mana defendan pertama hanya memegang hartanah tersebut dalam amanah konstruktif untuk plaintif.

Diputuskan, menolak tuntutan plaintif terhadap defendan-defendan dengan kos sebanyak RM58,000 kepada defendan pertama dan RM20,000 kepada defendan kedua hingga kelima yang perlu dibayar oleh plaintif:

(1) Memandangkan sifat perhubungan antara plaintif dan defendan pertama, isu yang perlu dipertimbangkan adalah sama ada kelakuan defendan pertama cukup tidak wajar untuk amanah konstruktif dikenakan. Mahkamah menjawab isu ini secara negatif. Dalam konteks kes ini, mahkamah mendapati defendan pertama tidak mendapat apa-apa pengayaan yang tidak adil ke atas hartanah tersebut. Dialah yang berniat untuk membeli hartanah tersebut, menandatangani perjanjian jual beli, membayar bil dan lain-lain. Dari awal lagi hartanah tersebut jelas adalah milik defendan pertama. Mahkamah mendapati plaintif gagal membuktikan bahawa pemakaian amanah konstruktif telah timbul. Tiada kelakuan tidak jujur, tidak bertimbang rasa atau penipuan yang dilakukan oleh defendan pertama dalam pemerolehan hartanah tersebut. Tiada keterangan oleh plaintif yang menunjukkan bahawa hartanah tersebut telah diperoleh oleh defendan pertama bagi pihaknya. Plaintif juga gagal menunjukkan kepada mahkamah bahawa defendan pertama mengambil pinjaman daripada plaintif untuk memperoleh hartanah tersebut. Oleh yang demikian, tiada asas untuk mahkamah mengenakan amanah konstruktif yang memihak kepada plaintif (lihat perenggan 53 & 58–59).

(2) Mahkamah bersetuju dengan defendan pertama mengenai tuntutan balasnya untuk pembatalan kaveat dibenarkan dengan ganti rugi dan relief pengisytiharan bahawa defendan pertama adalah pemilik sah hartanah tersebut. Oleh itu, mahkamah berpendapat defendan pertama berhak mendapat ganti rugi nominal berjumlah RM10,000, mengambil kira kesusahan yang dilaluinya apabila dia dihalang untuk berurusan

dengan hartanah tersebut selepas plaintif memasukkan kaveat tersebut. Memandangkan plaintif gagal dalam tuntutannya terhadap defendan pertama, tindakannya terhadap defendan-defendan lain juga gagal (lihat perenggan 60).]

Cases referred to

CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan [2021] 2 MLJ 155, CA (refd)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Low Tin Yong @ Low Yong Lian v Low Yong Thuan [2016] 3 MLJ 332, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)
Ong Kong Beng & Anor v Ong Kong Leong & Ors [2022] 3 MLJ 536, CA (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (distd)
Tay Choc Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (folld)

Legislation referred to

National Land Code s 344

Thinesh Bathmala (with Cheong Tick Soon PIC) (Raja, Darryl & Loh) for the plaintiff.
Ravin Woodhull (with Yong Chee Kong and Marcus Yong) (Azhar Yong & Co) for the first defendant.
Jess Koong (Aziz & Co) for the second defendant.

Azman Abdullah J:

INTRODUCTION

[1] The plaintiff, through the statement of claims applied for the following orders:

(a) satu pengisytiharan bahawa Plaintif mempunyai kepentingan proprietari dalam Hartanah tersebut;

(b) suatu injunksi untuk menghalang Defendan-defendan atau sesiapapun, sama ada dengan sendirinya, melalui agennya atau dengan apa jua cara lain daripada membatalkan Kaveat Persendirian yang dimasukkan terhadap Hartanah tersebut;

(c) suatu perintah pelaksanaan spesifik terhadap Defendan Pertama bahawa Hartanah tersebut dipindahmilik kepada Plaintif selepas bayaran penuh diselesaikan;

(d) sebarang relif lanjut dan lain-lain yang dianggap wajar dan adil oleh Mahkamah yang Mulia ini; dan

(e) kos.

[2] The first defendant then filed statement of defence together with counterclaims in which she stated as follows:

15. Segala perancangan Defendan Pertama untuk uruskan penjualan hartanah tersebut dengan seorang prospek pembeli telah tergendala dan/atau tidak dapat diteruskan akibat kewujudkan dan/atau kemasukkan kaveat persendirian oleh Plaintif, Defendan Pertama telah mengalami kerugian kewangan sebanyak RM490,000.00 disebabkan kemasukan kaveat tersebut dimana sebarang proses di pejabat tanah untuk uruskan jualan hartanah tersebut tidak dapat disempumakan akibat kaveat persendirian tersebut yang dimasukkan oleh Plaintif. (Butir-butirurusan penjualan akan dirujuk pada masa perbicaraan kelak)

16. Defendan Pertama mengalami kesusahan yang serius kerana tidak boleh dapat prospek pembeii yang baru. Sehingga kini Defendan Pertama tidak dapat menjual hartanah tersebut dan terpaksa berulang-alik dari Singapura untuk mengendalikan urusan hartanah tersebut. Defendan Pertama mengalami kerugian kewangan yang dianggarkan adalah sekurang-kurangnya sebanyak RM500.00 untuk setiap buian. Selepas berkahwin dan berpindah ke Singapura, kerugian kewangan yang saya alami dianggarkan adalah sekurang-kurangnya sebanyak RM3,000.00 setakat bulan Julai 2018 dan masih berterusan.

(Butir-butir kerugian akan dirujuk pada masa perblcaraan kelak)

17. Oleh yang demikian, Defendan Pertama memohon untuk perintah dan/atau relif seperti berikut:

i. tuntutan balas Defendan Pertama terhadap Plaintif dibenarkan dengan kos;

ii. satu pengisytiharan bahawa Defendan Pertama adalah pemilik sah hartanah tersebut dan meimpunyal kepentingan proprietari dalam hartanah tersebut;

iii. suatu perintah pelaksanaan spesifik terhadap Plaintif untuk kaveat persendirian tersebut dibatalkan dan/atau di tank balik kerana Plaintif tidak mempunyai kepentingan proprietari dalam hartanah tersebut;

iv. relif lanjut dan difikirkan wajar dan patut oleh Mahkamah yang Mulia ini.

[3] On 27 February 2023, this court had dismissed the plaintiff's claims against all the defendants with costs. This court had also allowed the first defendant's counterclaims and this court order the following:

> 1. Bahawa tuntutan Plaintif terhadap Defendan Pertama ditolak dengan kos sebanyak RM 58,000.00 yang perlu dibayar oleh Plaintif kepada Defendan Pertama;
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> 2. Bahawa tuntutan balas oleh Defendan Pertama terhadap Plaintif untuk kesalahan kemasukkan Kaveat pensendirian No. Perserahan 150/2018 bertarikh 02.03.2018 (selepas ini dirujuk sebagai 'Kaveat persendirian tersebut') ke atas sebuah rumah berkembar satu tingkat di Geran Mukim 3160 Lot 30694, Pekan Port Dickson, Daerah Port Dickson, Negeri Sembilan (dulunya dikenali sebagai H.S.(M) 4283, PT 2012, Pekan Port Dickson, Daerah Port Dickson, Negeri Sembilan) (selepas ini dirujuk sebagai 'Hartanah tersebut') dibenarkan dengan ganti rugi nominal sebanyak RM 10,000.00 yang perlu dibayar oleh Plaintif kepada Defendan Pertama;
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> 3. Satu pengisytiharan bahawa Defendan Pertama adalah pemilik sah Hartanah tersebut dan mempunyai kepentingan proprietari dalam Hartanah tersebut;
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> 4. Bahawa satu perintah bahawa Kaveat pensendirian tersebut yang dimasukkan oleh Plaintif dibatalkan tujuh (7) hari daripada tarikh penghakiman atau perintah Mahkamah Yang Mulia ini; dan
>
> 5. Bahawa tuntutan Plaintif terhadap Defendan Ke-2 hingga Ke-5 ditolak dengan kos sebanyak RM20,000.00 yang perlu dibayar oleh Plaintif kepada Defendan Ke-2 hingga Ke-5.

[4] Dissatisfied with such decision, the plaintiff now filed an appeal to the Court of Appeal. The reasons for the decision of this court now follow.

FACTUAL MATRIX OF THE CASE

[5] The plaintiff was at the material time a practising medical practitioner at Klinik Pakar Tharma at Wisma NKS, No 855/1, KM1 Jalan Pantai, 71000 Port Dickson Negeri Sembilan ('the clinic').

[6] The first defendant was an employee of the plaintiff at the clinic from early 1990s to 2017. She had left the employment to get married.

[7] The second defendant is a company incorporated in Malaysia, and is the vendor in the sale and purchase agreement dated 27 August 2015 ('the SPA') pertaining to a single storey semi-detached house known at Geran Mukim 3160 Lot 30694 Pekan Port Dickson (formerly known as HS(M) 4283 PT 2012 Pekan Port Dickson, Negeri Sembilan Darul Khusus ('the said property'). The second defendant is the housing developer of the property and

was given absolute right by the third to fifth defendants to develop and sell the property in virtue of a joint venture agreement dated 27 June 2012.

[8] The third, fourth and fifth defendants are the registered proprietors of the said property in the SPA.

[9] The epicentre of the disputes between the plaintiff and the defendants is on the proprietary ownership of the said property.

[10] To abridge, the plaintiffs position is that the said property was hold on trust by the first defendant. The reason being is that due to the first defendant's inability to secure a loan. In late 2015, the first defendant informed the plaintiff that the property was for sale by the second defendant for the price of RM419,600. The first defendant intended to purchase the property, but was unable to secure a loan. The plaintiff had assisted her in purchasing the property by making the payments due with agreement that the first defendant would pay the plaintiff back and take over payments for the property once she had obtained a loan. It is not disputed that the payments were made by the plaintiff vide cheques from his bank account for a total sum of RM334,967.

[11] On or about 2017, the plaintiff became suspicious when the first defendant asked him to complete the remaining payments for the said property. The first defendant them stopped turning up for work in November 2017 and the plaintiff was unable to contact or locate her.

[12] No repayment of the sums paid by the plaintiff has been made to date with regard to the purchase of the said property.

[13] On or about 2 March 2018, the plaintiff lodged a private caveat No 150/2018 on the said property to prevent the second defendant from fulfilling its obligations under the SPA to transfer the said property to the first defendant and to secure the interest of the plaintiff. The plaintiff successfully obtained a court order for an extension of time of the private caveat on 10 July 2018.

[14] On the other hand, the first defendant claims that the cheques were issued utilising funds belonging to her in which according to the first defendant, the money earned from salaries and savings plus from earnings from the two businesses which the plaintiff kept in the plaintiffs personal account. There was never any trust or agreement of mutual understanding with the plaintiff that the first defendant would repay the plaintiff if the first defendant secured a loan. In fact, the first defendant never applied for any alleged loan.

[15] The plaintiff's relief against the second to fifth defendants is merely to injunct them or any person, either by themselves, through their agents or by any other means from removing the private caveat entered on the property pending the full and final settlement of the disputes between the plaintiff and the first defendant.

THE PLAINTIFF'S SUBMISSION

[16] The plaintiff submit that premised on the facts and in law, the plaintiff retains a proprietary and beneficial interest in the property. The first defendant only held the property in constructive trust for the plaintiff and attempted to unjustly enrich herself by attempting to sell the property.

Constructive trust

[17] On this issue of constructive trust, it was submitted by the plaintiff that a constructive trust is a creature of equity. No formalities are required and intention of parties is not a relevant consideration. The plaintiff relied on the Federal Court's decision in the case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 which held as follows:

> A constructive trust is imposed by law irrespective of the intention of the parties ... What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[18] The plaintiff further submitted that even though there was no written agreement between the plaintiff and the first defendant, a constructive trust arises by operation of law and depends on the conduct of the parties, as stated by the Court of Appeal in *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765 whereby it was held as follows:

> In sharp contrast, no formalities are needed to create a constructive trust. The concept of a constructive trust is tied up with the principles of fairness and good conscience ...
>
> (a) a constructive trust arises by operation of law;
>
> (b) it certainly does not depend on the express intention of the settlor like the case of a private trust;
>
> (c) it is also not dependent on the presumed intention of the settlor like the case of an implied trust as well as the resulting trust;
>
> (d) it depends on the conduct of the parties.

[19] With regard to the conduct of the parties which brings to constructive trust, the plaintiff submitted that there is an agreement that the first defendant

will repay the plaintiff once a loan was secured by the first defendant. In fact, according to the plaintiff, he had attempted to assist the first defendant in obtaining a loan by approaching the branch manager of CIMB Bank, Lukut, Puan Faridah Bi. This was confirmed by Faridah's evidence and was not challenge at trial. Given that the first defendant had been unable to secure a loan, the plaintiff subsequently made regular payments to the second defendant vide cheques from his personal bank account with Maybank Bhd.

[20] On the allegation by the first defendant that the plaintiff had kept her salaries, savings and earnings from two businesses registered to her, the plaintiff submitted that such allegation has no basis and there was no evidence was led at trial to show this. The first defendant herself conceded in cross-examination that there is no evidence to show that her money was kept by the plaintiff. According to the plaintiff, the first defendant's salaries was paid by way of cheques.

[21] The businesses were registered under the first defendant's as she was assisting the plaintiff in administrative matters. The plaintiff was the one who had funded the two business. The agreement between the plaintiff and the first defendant was that any profits from the businesses would belong to the plaintiff. Despite the businesses' accounts being in the first defendant's name, no evidence was adduced to support the contention that the businesses were at any point profitable.

[22] Therefore, it was submitted by the plaintiff that the first defendant's contentions are utterly bereft of any evidence. The evidence at trial indubitably shows that the plaintiff had made payments in the total sum of RM335,967 (inclusive of the deposit). Thus, by the presumption created in law, the first defendant holds the said property in trust for the plaintiff. The plaintiff cited English Court of Appeal decision in *Hussey v Palmer* [1972] 3 All ER 744 (which was cited with approval by the Court of Appeal in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289) as follows:

> ... Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust ...

Unjust enrichment and unconscionability

[23] The plaintiff also submitted on the point of unjust enrichment and unconscionability in which according to the plaintiff, despite the plaintiffs

proprietary and beneficial interest in the said property, the first defendant had intended to sell the property for her benefit and move to Singapore. This will unjustly enrich the first defendant by the proceeds of the sale. The first defendant's actions were outright unconscionable and clearly in breach of the constructive trust.

Submission of the first defendant's counterclaim

[24] On the first's defendant's counterclaim that the sale of the said property could not be carried out due to the private caveat entered by the plaintiff, it was submitted by the plaintiff that the private caveat entered was proper in the circumstances. The plaintiff retains a proprietary interest over the said property. The counterclaim is completely devoid of merit.

[25] Even if the first defendant suffered losses (which is denied), the plaintiff submitted that the first defendant is not entitled to any compensation.

Submission against other defendants

[26] The plaintiff was constrained to include the second to fifth defendants (the vendor and proprietors named in the SPA) as parties to this suit. It was submitted that it is settled law that a claim for recovery of land or property which includes a prayer for the transfer of the land or property must cite the registered owner(s) as a party to the claim.

[27] In this suit, the plaintiff prays for, inter alia, an order for specific performance that the said property be transferred to the plaintiff upon the settlement of the remaining purchase price. In the circumstances, it was incumbent on the plaintiff to include the second to fifth defendants as parties to this suit. The plaintiff also remains willing, able and prepared to pay the remaining purchase price of the property.

THE DEFENDANTS' SUBMISSION

[28] The first defendant, on the other hand, submitted that the plaintiff must proof clear evidence of valid trust as there was never any written agreement for an alleged trust or even a trust deed adduced by the plaintiff. In this regard, the plaintiff must prove that there was clear evidence of an intention to create a valid trust.

[29] Counsel for the first defendant submitted that according to s 344 of the National Land Code 1965 (now 2020) ('the NLC'), it expressly stated a statutory provision for registration as trustee and deposit of a trust instrument. However, in this case, there was no trust instrument exist. In fact, there is no

clause in the SPA dated 27 August 2015 of any alleged trust. The plaintiff during cross-examination had also admitted that there was no written agreement or trust deed.

[30] It was further submitted that it is a requirement for a clear evidence of a valid trust. The first defendant cited the case of *Low Tin Yong @ Low Yong Lian v Low Yong Thuan* [2016] 3 MLJ 332 where the Court of Appeal held as follows:

> [51] Firstly, there is nothing on the title or the memorandum of transfer to bear out the existence of such a trust. Section 344 of the National Land Code ('said NLC') provides for the registration of any trust created in the memorial of registration. In short, the title does not reflect that the appellant holds the said land on trust as a trustee. There is no endorsement with the word 'trustee' on the title deed to the said land to evidence the existence of a valid trust in favour of the siblings.

[31] Similarly, the Court of Appeal decision in *Ong Kong Beng & Anor v Ong Kong Leong & Ors* [2022] 3 MLJ 536 also had expressly opined that although there is no legal requirement that a trust should be in writing, nonetheless, the law requires clear evidence of a valid trust. It was held as follows:

> [154] We turn now to the issue which goes to the heart of the case. The law in respect of how a trust is constituted in Malaysia is well established. The elements which are necessary to constitute a trust are, certainty of intention, certainty of object and certainty of subject matter. The trust need not be in writing and does not have to be formal. This position is well reflected in the Federal Court decision in *Wan Naimah*. Here, it is an undisputed fact that there is no document eg a trust deed or other legal document or written statement that can be relied upon to prove the existence of a trust over the lands.
>
> [155] Further, the so-called trust was not registered pursuant to s 344 of the National Land Code. No doubt, there is no legal requirement that a trust should be in writing (see: *Grant v Grant*). Be that as it may, the law nevertheless requires clear evidence that the elements for a valid trust exist, namely, certainty of words, certainty of subject and certainty of object.

[32] Counsel for the first defended also pointed out some contradiction of letter of demand and caveat with the plaintiff's pleaded claim which this court summarise as follows:

Wordings from the letter of Demand dated 8 March 2018 from Messrs R Shan & Associates	'2.3 Sometime in mid year 2015, our client had entrusted you to place a booking for the purchase of a semi-detached house held under HS(M) 4283, PT 1012, Daerah Port Dickson, Negeri Sembilan (now GM 3160, Lot 30694, Pekan Port Dickson, Daerah Port Dickson, Negeri Sembilan) and having the address at No.3, Jalan PD Teknik 2, Taman PD Teknik 2, 71000 Port Dickson, Negeri Sembilan ('the Property') with PD Homes Sdn Bhd ('Developer') on his behalf by giving his personal cheque to you; 2.5 In November 2017, our Client discovered that you had misused and/or abused the trust given by our Client to you by illegally/wrongfully converting and/or depriving all the above cheques which were entrusted you to pay to the Developer on our Client's behalf in that you have currently registered your name with the Developer in respect of the Property.'
Wordings from the caveat entered by the Plaintiff via Messrs R Shan & Associates	'Alasan-alasan tuntutan saya ke atas tanah/kepentingan itu ialah: Saya telah membayaran wang pendahuluan berperingkat kepada tuantanah sebanyak RM334,967.00 bagi tujuan pembelian hartanah tersebut dan sementara menunggu untuk menandatangani perjanjian Jual Beli tersebut, saya memasuki kaveat ini untuk melindungi hak kepentingan saya sementara menunggu pindahmilik ke atas nama saya.'
Wordings on letter of demand dated 13 March 2018 from Messrs R Shan & Associates to the Second Defendant	'2 We are instructed that our Client has sent a notice of demand to his former employee, AMARATHAM A/P RAMAIAH (NRIC NO: 731112–05–5380), for misuse and or abuse of the trust given by our Client to her by illegally/wrongfully converting and/or depriving all our Client's personal cheques which were entrusted her to pay to you on our Client's behalf

	for the purchase of the Property in that AMARATHAM A/P RAMAIAH has currently registered her name with you in respect of the Property. A copy of the of the Notice of Demand addressed to AMARATHAM A/P RAMAIAH is enclosed herewith for your record.'
Wordings from the plaintiff's pleaded statement of claim	'8. In late 2015, the Plaintiff was informed by the 1st Defendant that the Property was selling for the price of RM419,600.00 from the 2nd Defendant. The 1st Defendant was very interested in the Property but was unable to secure a loan, from any banks to purchase the Property. 9. In view of this, the 1st Defendant approached the Plaintiff and requested financial assistance. In light of her long-term employment with the Plaintiff, the Plaintiff agreed to advance, and did advance the 1st Defendant the sum of RM1,000.00 in cash to enable her to pay the 2nd Defendant a deposit for the Property. 10. On or about 27.8.2015, the 1st Defendant entered into the SPA with the 2nd, 3rd, 4th and 5th Defendants to purchase the Property from the 2nd, 3rd and 4th Defendants. 11. As the 1st Defendant continued to have difficulties in securing a loan, the Plaintiff agreed to pay the instalments due in respect of the Property until the 1st Defendant is able to secure a loan and take over the payments. The Plaintiff and the 1st Defendant had a mutual understanding that the 1st Defendant would repay the Plaintiff for the payments he made and take over the payments due under the SPA when the 1st Defendant eventually secuared a loan.'

[33] From the above, the first defendant submitted that the plaintiff in the statement of claim stated a completely different story that he allegedly had advanced monies for the first defendant to purchase the said property.

[34] This contradiction of the plaintiffs statement of claim with the documentary evidence caveat, as well as the letters of demand that were all in March 2018 from the plaintiffs previous solicitors showed that the plaintiff has clearly approbated and reprobated in his position of later stating that he had a beneficial interest as he had advanced monies to the first defendant.

[35] The plaintiff cannot be permitted in law to approbate and reprobate in law and the counsel for the first defendant referred to the case of *CIMB Islamic Bank Bhd v Khairuddin bin Abu Hassan* [2021] 2 MLJ 155 which held as follows:

> [94] Since the respondent accepted that the auction was proper and valid, he should not then continue the suit against the appellant. He should not be allowed to approbate and reprobate. In the Court of Appeal's case of *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin* [2018] 3 MLJ 354 it is said as follows:
>
> > *Based on the above actual facts, the respondent could be said to be taking a different stance before the court in this action and under the law he was not allowed to blow hot and cold in the attitude that he adopts*. The learned judge failed to consider that the respondent's claim for trespass and the claim he had already made at the second enquiry arose from, the same facts. He should accordingly be estopped from commencing this action. The respondent having made a choice at the second enquiry could be treated as having made an election from which position he should not be allowed to abandon. He had taken a benefit arising out of the course of conduct which he had pursued earlier and with which his subsequent conduct was inconsistent with his election. The respondent should not be at liberty to approbate and reprobate having taken a particular position. Reference in this connection could be made to the decision of this court in *Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal* [2018] 3 MLJ 354; [2016] 8 CLJ 804 wherein it was held at p 369 (MLJ); 814 (CLJ) (emphasis added to highlight the similarities):
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> > > [20] The appellant's conduct as described hereinbefore is plainly inconsistent and contradictory. The alleged rights pursued and relief sought through the present action are *remarkably inconsistent* with and contradict the right pursued and relief sought in the land references ... *The appellant's conduct, as it were, could thus be properly described as blowing hot and cold* that while the appellant approved the acquisitions they also rejected it. *The appellant is not permitted to approbate and reprobate on the issue* of the acquisition of the seven plots of land.

[36] The first defendant also submitted that the plaintiff had chosen to not plead the letters of demand dated 8 March 2018 and 13 March 2018 in his pleading. As such, the plaintiff, deliberately not pleaded by reason that those letters reflect an obvious contradiction. Besides, it was also submitted that apart from the contradiction of the plaintiffs statement of claim with the plaintiffs previous solicitors' letter of demand dated 8 March 2018, accusing the first defendant of illegally/wrongfully purchasing the said property under her name, yet there was no police report lodged by the plaintiff. Thus, clearly reflects the plaintiffs unclean hands.

[37] Another point raised by the first defendant in on the police report which was lodged by the first defendant dated 29 November 2017. In this report, it is

clear evidence that when the first defendant resigned from the plaintiff's employment in September 2017, as she was getting married to a Singaporean and moving to Singapore, the plaintiff became angry and broke the windows in the first defendant's house, stole her handbag and her gold chain. However, a few days later on 3 December 2017, the first defendant withdrew her police report when she was approached by the plaintiff to settle their dispute, as it would affect the plaintiff's reputation.

[38] The first defendant also submitted that the plaintiff had failed to pray for a declaratory relief of trust but instead had merely prayed for a declaration that the plaintiff has proprietary interest in the said property, which clearly reflects a cloaked declaration and abuse. The first defendant relied on the case of *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812 in which was submitted that without establishing a declaratory relief of a valid trust to the said property as pleaded para 11 of the plaintiffs statement of claim, the plaintiff cannot in law leapfrog to be entitled to a declaratory relief of proprietary interest to the said property. This would be tantamount to a 'cloaked' declaration which the law would not allow.

[39] In the submission, the counsel for the first defendant also submitted that even if the plaintiff alleges that the sum of RM334,967 was an advancement by the plaintiff (which was denied), the first defendant had on 14 March 2018 paid the total balance of RM83,992 (RM20,998 + RM62,994) for the said property, Therefore, according to the first defendant, since there is no declaratory prayer by the plaintiff in respect of trust, the plaintiff cannot rely on any omnibus prayer to claim for declaration on any proprietary interest as well as specific performance against the first defendant to transfer the said property to the plaintiff, as the plaintiff had validly entered into a SPA with the second to the fifth defendants and had on 14 March 2018 paid the balance purchase price of RM83,992.

[40] With regard to the first defendant's arguments that the monies paid by the plaintiff was actually her own monies, it was submitted by the first defendant that as the plaintiff alleges that the first defendant's loan was rejected on 15 December 2015, it does not seem logical for the plaintiff to continue paying from 30 December 2015 until 20 April 2017.

[41] Moreover, despite the plaintiff pleading at paras 8 and 11 on the allegation of the first defendant trying to secure a loan in the statement of claim, the plaintiff never mentioned any fact of the RM300,000 banked in by the plaintiff into the first defendant's account. It was only after the first defendant at para 8 of the defence had pleaded that the plaintiff had on 8 December 2015 paid part of the first defendant's savings of RM300,000 into

the first defendant's account at CIMB Bank Bhd for the purchase of the said property, did the plaintiff for the first time turn around the story to say that that money was paid to allegedly help the first defendant to secure loan.

[42] According to the first defendant, the plaintiff was keeping her monies as her savings. The monies were from her salary and income from two businesses and she requested the plaintiff to issue cheques as she did not have a cheque book. In addition to that, the plaintiff must have been keeping the first defendant's share of profits but had informed the first defendant that he had been saving for the first defendant as the first defendant had no experience. Likewise, given that the first defendant had been working for more than 25 years and helping run the plaintiffs clinic, the plaintiff must have kept the first defendant's salary of RM2,000 and the first defendant had survived on the remaining allowance of between RM1,500 to RM2,000 per month.

[43] It was submitted by the first defendant that the sum of RM334,967 was from the first defendant's savings that were kept by the plaintiff.

[44] The first defendant sum up his submission by saying that the plaintiff had victimised the first defendant, who had first started employment as a young 18 years old girl that she trusted the plaintiff to keep her savings. After the first defendant's short marriage had ended in 2006, the first defendant continued to innocently trust the plaintiff as her father, as her own family had shunned her because of her first divorce at a young age. This evidence can be seen from the fact that it is undisputed, that the first defendant stayed upstairs above the plaintiffs clinic. It will not make sense or be logical for the first defendant to be only paid RM12,000 per month and only in the month before she resigned, the sum of RM2,500 per month, despite working for the plaintiff for 25 years in running his clinic as well as both the other businesses.

[45] The counsel for the first defendant went further in his submission and submitted that the plaintiff, due to his anger and being disgruntled with the first defendant, had filed this claim in vengeance and, in order to frustrate the first defendant's beneficial legal rights to the said property. The plaintiff took more than two years to enter a caveat and file this frivolous claim against the defendants since the execution of the SPA was taken place on 27 August 2015. This shows that the plaintiff had not come with clean hands to seek any equitable relief declaratory and specific relief.

[46] It was further submitted that the plaintiff has no proprietary rights and caveatable interest on the said property. Moreover, the plaintiff himself had recognised the legality of the SPA by not seeking any prayer for invalidation of the SPA, despite the plaintiff's previous solicitors' letters of demand accusing the first defendant of wrongfully purchasing the said property under her name.

It is also undisputed that the first defendant had been maintaining the said property for all these years of paying the government rates and taxes.

[47] The first defendant prayed that the plaintiff's claims be dismissed with costs and consequentially, the first defendant's counterclaim for the removal of caveat be allowed with damages to be assessed together with a declaratory relief that the first defendant being the legal owner of the said property.

[48] With regard to the second to fifth defendants, they submitted that they have suffered prejudice due to non-fulfilment of obligations pursuant to the SPA as they are now exposed to the risk that the first defendant may pursue its remedies to liquidated damages for late delivery of vacant possession pursuant to cl 22(2) of the SPA. They have also suffered prejudice when they have been put to loss and expense by way of legal costs in defending the current action. The plaintiff had put them through unwarranted and unnecessary litigation by bringing them as parties in this current action where the real avenue of disputes is indeed between the plaintiff and the first defendant and the second to fifth defendants have no role to play in the legal fiasco between the plaintiff and the first defendant.

OBSERVATION AND DECISION OF THE COURT

[49] After hearing both submissions of the parties and considering all the documents filed before this court, I recapitulate that the main issue to be decided by this court is on whether or not the plaintiff retains a proprietary and beneficial interest in the said property in which the first defendant only held the said property in constructive trust for the plaintiff.

[50] It is now the duty of this court to determine as to whether a constructive trust has arisen, as a result of the conduct of the parties,

[51] The Federal Court in the case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 observed that constructive trust is an imposition of law irrespective of the parties' intention. The concept of constructive trustee operates on the basis of whether justice and good conscience demand for its application. In the case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 at 107, the Federal Court held as follows:

> [111] It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts. A constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced another to act to their detriment they would acquire a beneficial interest in the land/property. A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law. In *Takako Sakao (f) v Ng*

Pek Yuen (f) & Anor [2009] 6 MLJ 751, it was held that:

> A constructive trust is imposed by taw irrespective of the intention of the parties. And it is imposed only in certain circumstances, eg where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof.

[112] Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice. Equity will impose obligation on the defendant to hold the property for the benefit of another.

[52] I also refer to the case of which explained on the concept of costructive trust as follows:

> The circumstances where constructive trust may arise have been lucidly stated in the case of *Paragon Finance plc v DB Thakerar & Co (a firm), Paragon Finance plc and another V Thimbleby & Co (a firm)* [1999] 1 All ER 400 (CA), Civil Division. There Millett LJ speaking and writing a separate judgment for the Court of Appeal, succinctly said at p 409 of the report:
>
> > A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and *Rochefoucald v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.
> >
> > The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'.

[53] Therefore, having deliberated on this issue, I find that the plaintiff failed to prove that the application of constructive trust has arisen. I find no

dishonest, unconscionable or fraudulent conduct been committed the first defendant in the acquisition of the said property. There is no evidence by the plaintiff which show that the said property was acquired by the first defendant on his behalf. Neither that the plaintiff able to show to this court that the first defendant took loan from the plaintiff to acquire the said property.

[54] With a palpable lack of evidence, the only argument of the plaintiff is that he had paid the amount of RM334,967 vide cheques from his bank account. However, the first defendant had successfully raised a concern that such monies initially belong to her. The monies were earned from salaries and savings plus from earnings from the two businesses which the plaintiff kept in the plaintiffs personal account.

[55] Even though there is no evidence was led at trial by the first defendant to prove those arrangement between the plaintiff and the first defendant on the savings, with the fact that the they are now at loggerheads, it is difficult for this court to accept the plaintiff arguments.

[56] On the basis justice and good conscience, it would be unjust if this court disregard the first defendant's interest on the savings taking into consideration the following:

(a) that the first defendant had kept her salaries, savings and earnings from two businesses registered to her with the plaintiff;

(b) that the businesses were registered under the first defendant's as she was assisting the plaintiff in administrative matters;

(c) that there is no evidence by the plaintiff that he was the one who had funded the two business;

(d) that there is no evidence on the agreement between the plaintiff and the first defendant that any profits from the businesses would belong to the plaintiff;

(e) that since the businesses were registered under the first defendant, it is difficult to accept that she was not shared any profit or was not paid anything. Moreover, the first defendant had been working for more than 25 years with the plaintiff and she was only be paid for salary of RM1,500 to RM2,000 per month despite having two businesses registered under her name;

(f) that the first defendant is having good relationship with the plaintiff as she started her employment since she was 18 years old. The first defendant even stayed upstairs above the plaintiff's clinic; and

(g) that there are contradictions in the plaintiffs letter of demand, the caveat and the plaintiffs pleaded claim which raised doubt to this court.

[57] In this regard, I am guided by the decision of the Court of Appeal in the case of *Tay Choc Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289 which held as follows:

> [91] A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity* (26th Ed) (at p 201), a constructive trust is 'a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties'. In *The Law of Trusts* by JG Riddali (3rd Ed) (at p 359) the learned author's views are as follows:
>
> > The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it ...

[58] In light of the nature of the relationship between the plaintiff and the first defendant, the issue for consideration was whether the first defendants' conduct was sufficiently unconscionable for a constructive trust to be imposed? The answer is in negative. In the context of the present case, I find that the first defendant had not gain any unjust enrichment over the said property. She is the one who intended to by the said property, signed the SPA, paid bills and etc. It is from the beginning that the said property was clearly belongs to the first defendant. The only role played by the plaintiff are on the payments of the purchase price which according to the first defendant, such payment was made from her savings with the plaintiff which this court accept those contention. It is in my mind that no one can easily give you money without any consideration. In addition to that, no agreement was made between the plaintiff and the first defendant if it is true that the plaintiff loan his money to the first defendant.

[59] As such, there was no basis for this court to impose a constructive trust in favour of the plaintiff as I find no evidence of dishonest conduct or dishonesty on the part of the first defendant in which such conduct is the hallmark and basis for the imposition of a constructive trust. It is my considered view that the facts of this case bear no relation to the landmark case *Takako Sakao* where in that case, there was a dishonest appropriation of the innocent party's beneficial interest in the property which the wrong-doer sought to dishonestly appropriate the entirety of the property without acknowledging the innocent party's interest.

[60] This court held to dismiss the plaintiff's claim and shall now cosider the first defendant's counterclaims. this court agreed with the first defendant on their counterclaims for the removal of caveat be allowed with damages and a

declaratory relief that the first defendant being the legal owner of the said property. As such, in my considered opinion, the first defendant is entitled to a nominal damages of RM10,000, taken into consideration of the hardship that she went through when she was restricted to deal with the said property upon the entry of the caveat by the plaintiff. Since the the plaintiff failed in his claims against the first defendant, his action against the other defendants also failed.

CONCLUSION

[61] This court after evaluating the facts and evidence with a fine tomb comb dismiss the plaintiff's claims against all the defendants with costs. Order of this court is stated in the above para [3]. This court award costs of RM58,000 to the first defendant dan costs of RM20,000 to the second to fifth defendants to be paid by the plaintiff.

Plaintiff's claims against defendants dismissed with costs of RM58,000 to first defendant and RM20,000 to second to fifth defendants to be paid by plaintiff.

Reported by Dzulqarnain Ab Fatar